United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1396

To be argued by
Martin E. Gotkin

B
P/S

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

MARCUS GEORGE HERO,

Defendant-Appellant.

----------x

DOCKET NOS.:

75-1396
75-1397
75-1398

BRIEF IN BEHALF OF APPELLANT HERO

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Statutes and Rules Cited:

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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered November 18, 1975 in the United States District Court for the Southern District (Gagliardi, J.) convicting Appellant Hero after trial of the crimes of falsifying statements to be submitted to the United States Small Business Administration in violation of Title 18, U.S.C. Sections 1001 and 2; (three counts); submitting false statements for the purpose of a loan application in violation of Title 18, U.S.C., Sections 1014 and 2 (three counts); and conspiring to do the same (two counts). Appellant was sentenced to six months concurrent sentences on all the above charges and was ordered placed on probation for a one year period at the expiration of his term of imprisonment.

Appellant has been granted a stay of execution of this sentence pending the determination of this appeal.

QUESTIONS PRESENTED

1. Whether the joinder in one trial of four separate indictments deprived appellant of his due process right to a fair trial.

2. Whether the testimony pertaining to the prior similar acts was so prejudicial that appellant was deprived of a fair trial.

3. Whether appellant's newly discovered evidence, obtained subsequent to his trial, requires that the verdict be set aside and a new trial ordered; or alternatively, that a hearing be held.

STATEMENT OF FACTS

Appellant was charged in four separate indictments with the following crimes:

74 Cr. 1051 (Modern Century Indictment) charged him and others with conspiring to defraud the United States and its departments and agencies in connection with the performance of their lawful governmental functions, by obstructing the United States Small Business Administration in administering the Small Business Act, Title 15 U.S.C. Sections 631 et seq., and to violate Title 18, U.S.C. Sections 201, 1001, 1014 and Title 15 U.S.C. Section 645 (a). Count two charged appellant and others with making false and fictitious statements and causing the same to be submitted to the United States Small Business Administration in violation of Title 18 U.S.C. Sections 1001 and 2. Count three charged the making of a false statement and report for the purpose of influencing the action of a bank in violation of Title 18 U.S.C. Sections 1014 and 2.

74 Cr. 1053 (North State Packing Indictment) and

74 Cr. 1055 (Mini Enterprises Indictment) both charged appellant with the crimes similar to those set forth above.

74 Cr. 1054 (Smoke Watchers Indictment) charged appellant and others with conspiracy to commit extortion and the substantive count of extortion as well.

On March 17, 1975, before the Hon. Lee P. Gagliardi, counsel argued that appellant should be accorded separate trials on the above indictments as the jury, when confronted with the four indictments, will have to conclude "By God, he has to be guilty of something." The Court denied the motion and consolidated the four indictments for the purpose of the single trial. (min of 3/17/75, p. 4)

The Government at this time informed the Court that it would be introducing prior similar acts involving other companies such as Illustrated Readers, Forma, Family, Billy Baird and Opticon. The Government stated that the rendition of these names was sufficient to give the defense notice as to the nature of the similar acts. (6)* The Government stated further that its witnesses were timid and preferred not to have their identifies known at this time. When counsel stated that it was prejudicial, the Court responded that it was not ruling such evidence admissible until it was actually offered. (min. of 3/17/75, pp. 6, 7)

*Numerical references are to pages of the trial transcript.

GOVERNMENT'S CASE

BACKGROUND

JOHN GAETER, Chief of the Finance Division of the Small Business Administration (hereinafter referred to as SBA), testified that he is in charge of all money-making functions of SBA for the New York District and supervises 24 people within this section. (3, 5)* According to Gaeter, the objective of SBA is to help small business concerns obtain financing which is not available from regular lending sources. They also provide a managerial assistance program which consists of service corporations or retired executives that specialize in different fields. SBA would assign a particular executive called a SCORE representative to help out a particular business. SCORE representatives are used only to investigate a direct loan as opposed to a guaranteed loan which is made by the bank, provided that the Federal Government will guarantee 90% of that loan. (8-9)

Mr. Gaeter stated that a loan officer for SBA first analyzes loan packages and makes a recommendation whether it is favorable or unfavorable, and a supervisory officer makes work assignments and reviews the loan after an analysis is made. (4)

Mr. Gaeter further testified that a person desiring money first goes directly to the bank to determine if he could secure a loan without

*Numerical references are to the pages of the trial transcript.

SBA participation. If this is the case, a bank will require all the financial statements and resumes of people working for the company. The bank will give a set of SBA applications to the prosepctive borrower and upon completion of all the required forms, the bank will forward the entire package to SBA. The loan application and the supporting documentation would be given to a particular loan officer that services that bank and he will check the application to see if it is completed. The application is then logged in the house and returned to the loan officer. (10-11)

Gaeter then set forth the following factors which play a material part in SAB's consideration as to whether a given loan should be approved: the net worth of a company; its projection for a given time period; the existence of any collateral; whether the company has engaged in any research; whether any service or finders' fees have been paid to obtain the loan, as SBA does not permit finders' fees; and whether key personnel of the company have life insurance policies naming the company as beneficiary. (22-33)

In a direct loan situation, the applicant, Gaeter explained, comes directly to SBA, is interviewed by a loan officer and given an application if found to be eligible. In this regard, a loan officer does not have to be assigned the case randomly, but could go to the girl and say that as he interviewed the people initially, the case should be assigned to him.

(53-54) A SCORE representative is then usually sent to examine the applicant's operation, and he makes a managerial evaluation. Generally, SBA goes along with this evaluation. (58-59) However, on the Cheung Garden application, the loan officer was Joseph Spedale, who disagreed with the SCORE representative's recommendation. (58-62)

Finally, Gaeter described an opportunity loan as one that is made to socially or economically disadvantaged people. (65) This particular loan has a longer maturity and collateral is not as important. Therefore, SBA allows for a greater risk. (64)

After identifying the Mini Enterprise and Modern Century loan applications, the witness stated that both were seeking bank guaranteed loans, and made certain representations on their respective applications regarding net worth, collateral, research and development, the existence of finders' fees, and life insurance policies. (22-41) The State Appliance Company sought a direct loan which was thereafter authorized. However, certain conditions were first set on this authorization such as the assignment of a life insurance policy on the life of Sal Catale; adequate hazard insurance; an assignment of the contract of advertisement time between the borrower and the company possessing such time; and the corporate tax returns for the years 1970-1971 to demonstrate no adverse conditions. (43-46)

According to Mr. Gaeter, appellant's name did not appear on any of the documents which he had described. Moreover, appellant never telephoned him or contacted him at any time regarding these loan applications. In fact, he had not spoken to appellant within the last five years, and had not seen him at the SBA office since 1970. (67)

SMOKE WATCHERS AND MINI ENTERPRISES

In 1971, Nicholas Costa was the President of Smoke Watchers, which is currently in bankruptcy. (267) Its objective was to help people stop smoking and to develop products to achieve this end. (268) Smoke Watchers had done an extensive amount of research into this area, and had had over 200 franchises in the country that would run its clinics. (269) In November of 1971, Costa first met Sal Catale who loaned Smoke Watchers some money, and at a later date, Catale became treasurer of Smoke Watchers. (125)

In October of 1972, when Smoke Watchers was experiencing financial difficulties and was attempting to obtain funds, Costa and Catale first met with Leonard Randall, the President of the Small Business Electronic Investment Company, located in Lynbrook, Long Island. Also present at this particular meeting was Gerald Devins, who was Randall's financial consultant. They asked Randall if they could borrow $12,500 for a short period of time and said they would repay the

loan with the Smoke Watcher's SBA loan that was currently pending. (124-127) When Randall and Devins learned that Gene Foley of SBA had prepared the Smoke Watcher's package, they both vent[illegible]ed the opinion that the loan would not be approached as Foley was not in good stead with SBA. (127-279) Devins at this time stated that "for 2% of the face amount we can assure you of getting your loan." (129) Both Catale and Costa ignored this statement, and no loan agreement was reached that day. (129)

On October 12, 1972, they learned that SBA had rejected the Smoke Watcher's loan. Upon re-submission of the entire package to SBA, it was rejected again on October 20, 1972. (283)

In the interim at a meeting with Randall and Devins, Costa and Catale signed for the $12,500 SBIC loan for Smoke Watchers for which they had to pay Devins 10% of the face amount of this loan. (135) At this time, Devins told them that in addition to working out of his office, they could also do SBA loans, since he had the bank contacts and controlled several million dollars, and Randall was able to contribute prospective corporations and borrowers. (137) Devins also mentioned that he knew appellant, who was a former employee at SBA and who could prepare and supervise the necessary statements. (138) According to Devins, appellant knew the people in SBA. (138) For their services in connection with obtaining these loans, Devins was to receive 2% of

the face amount of the loan; Randall was to receive 2% for finding the borrowers; and appellant was to receive 2% for his work in preparing the SBA papers. Appellant was also to receive 2% for a messenger, and 10% for the people at SBA. (139)

Accordingly, after SBA had rejected Smoke Watcher's second application, Catale telephoned Costa and told him that Devins, Randall and appellant had found a way for them to raise money for Smoke Watchers. (284) They were to establish another corporation and make this corporation a distributor for Smoke Watcher's products. Hence, they would be able to secure a loan without using Smoke Watcher's name. (284) Catale suggested that they use Mini Enterprises which had been dissolved for non-payment of taxes. (149-150) This corporation was then reinstated. (150)

On October 30, 1972, another meeting was held at Randall's office. Present at this time was Randall, Devins, Catale, Costa, appellant, and Ms. Ugis (Costa's secretary). Costa brought all the information pertaining to Smoke Watcher's research and development to this meeting. (286) This was the first time that Costa and Catale had met appellant. (152)

Devins then proceeded to prepare the financial statements and the backup sheets for Mini Enterprises. This corporation was to sell vitamins and lozenges. (155) The application, which was being prepared, contained many false statements: it reflected that $35,000 had been paid for

television advertising time whereas in fact Mini Enterprises did not possess any such time; $25,000 was listed for distribution but Mini Enterprises did not have any distribution; $6,250 was set forth for furniture and fixtures, but Mini did not possess any fixtures; a figure of $40,500 for research and development had been copied from the Smoke Watcher's balance sheet since Mini never engaged in any research and development into smoking; a figure of $12,000 was listed for inventory despite the fact that Mini had no inventory; they also listed that Mini possessed hazard insurance whereas in fact it had none; and Ms. Ugis was designated as Vice President of the corporation when in fact there were no officers of the corporation. (157-163, 169)

Appellant physically wrote out the SBA application with the figures that Devins gave him. While discussing what to put down on the application, appellant was about two seats away. (160-161) Ms. Ugis did the typing while Devins and appellant instructed her regarding what to type. According to Catale, appellant did not supply the figures for Mini Enterprises, but Devins did. But, according to Costa, it was appellant who was directing most of the application since he claimed that it was his expertise. Appellant also pointed out that Smoke Watcher's name was "poison" with SBA and to have that name appear

in connection with the Mini application would mean its sudden death. (332). Hence, he asked Ms. Ugis to change the Smoke Watcher's name to read "special formula." (291) Appellant also stated that Costa would have to put down a minimum of $35,000 worth of television time, and it was both appellant and Devins who told Costa that he would have to list some inventory so he agreed to $16,000 worth. (292, 295)

Additionally, Mr. Costa and Ms. Ugis prepared a letter giving a brief history of the business and the benefits that the business would receive from the loan. (156) Both Devins and appellant reviewed the letter and appellant stated that it represented a good description. (157)

The Mini application was signed by Catale on October 31st and was then submitted to the bank. (169) On December 8, 1972, SBA approved this application. (170) Because the application had been approved, Costa had to sign a lease for an office in Devin's building on Long Island for $500 per month, and he also had to sign an agreement that Devin and Randall would be paid $350,000 for consulting services over a 15 year period. (174, 297-98) Pursuant to Devin's instructions, Catale was told to pay $47,000 to appellant which was given to appellant in the Pan American Building. (231) Of this $47,000 the people in SBA were to receive $35,000; appellant was to receive $7,000, and a messenger was to receive $7,000. Appellant at this time said he could accept his share

in a check as he had done this quite often. (239) Smoke Watchers thereafter received $200,000 from Mini Enterprises. (298-99)

In March of 1973, Costa attempted for a third time to get an SBA loan for Smoke Watchers. Appellant telephoned Catale and told him that the Smoke Watcher's loan had been approved by the bank, and that if they wanted SBA approval, it would cost $65,000 to $80,000. (189) When Catale said that appellant should not get involved in Smoke Watchers, appellant responded that he was only passing the information to them as directed by the people at SBA. (189) Catale informed appellant that he would have to discuss it with Costa. After the SBA loan had been rejected, appellant telephoned them and said that he understood that they were willing to go along with the $60,000, but he did not trust them. Therefore, he wanted Catale to guarantee the payment. (305) Costa and Catale were then supposed to obtain three letters so that SBA could reconsider the loan. (311) Appellant later informed them that since he was not going to receive any of the $60,000, he needed something for himself. Mr. Costa therefore agreed to give appellant 25,000 shares of Smoke Watchers' unregistered stock. (194, 318) However, they never received the SBA loan and in September of 1973, Smoke Watchers went bankrupt. (314)

MODERN CENTURY LOAN

Richard RePass, engaged in the book publishing business in 1970, met Gordon Saks, who had a publishing company of his own called Lyons

Press, specializing in children's books. (397, 578)

In 1972, after incorporating the Modern Century Illustrated Encyclopedia, Inc., Saks and RePass attempted to obtain financing. They had a letter of intention from a Wall Street underwriter who was supposed to raise one million dollars for the company, but this project was unsuccessful. (401) Since the underwriting had failed, their company desperately needed the money. (402-03)

In the latter part of June of 1972, they were introduced to Devins in Randall's office. Devins told them that they should have television time which would beef up the company's assets by a substantial amount. (402-403) Devins explained that through one of his companies he owned a substantial block of television time available at wholesale rates. (403) RePass and Saks were then offered $350,000 worth of television time made payable by a note for $300,000, which note was to be paid over a five year period or by an underwriting, whichever occurred sooner. (403)

Thereafter, in October of 1972, another meeting was held among RePass, Saks, Randall and Devins. The purpose of this meeting was to get the quick and necessary financing that Modern Century needed. (408) Devins proposed that they should apply for a $350,000 SBA loan and attached the following conditions thereto: Randall, Devins and another person were to receive 20% of the face amount of the loan as fees; Randall and Devins

would also receive 10% or 15% of the stock in the corporation; a consultation fee would be paid for several years to both Randall and Devins; and they would agree to sublet office space in Devins' offices for the next five years at $500 per month. (408-409) Devins had previously told Saks that he knew someone who could arrange SBA loans. (583)

At another meeting on October 17th, RePass and Saks met appellant who gave them some blank SBA forms and told them how to fill out these forms. (411) When Randall introduced appellant to Saks, he specifically stated: "This is Mark Hero and he could handle the inside part for SBA." (587) Appellant then told Saks that $35,000 would have to be paid in order to take care of the people at SBA and to assure the passage of the loan. Appellant also remarked that he controlled these people. (588) According to appellant, a publishing company would not qualify for an SBA loan. Therefore, it was decided that Modern Century Publishing Company should be changed to Modern Century Company. (591) They then made up mock answers to the questions on the SBA application. RePass claimed that every question was gone over by appellant. (410-430, 592-599, 601)

The next day, RePass and Saks went to see a Mr. Feltner at Trans America Co. in an attempt to obtain a loan. When Devins and Randall learned of this, they were outraged and stated that they had blown the entire deal. (443, 608-613) Since RePass had an appointment the next day at appellant's home to have him review the SBA application, Devins

told him "You can go there. I don't know if it will do you any good but you can go if you like." (445)

Another meeting was then held in Randall's office, wherein Randall told them that they might be able to salvage the loan, but that they would have to agree to even more stringent terms. (448-449) A second agreement was reached. Before Saks took the SBA application to the bank, he first met appellant, who was parked in a car in front of 450 Park Avenue. Appellant took a cursory look at the application, stated it looked allright, and told him to take it to Catale. (616) RePass and Saks then went to Catale's office and gave him the SBA application to submit to the bank. Finally, on November 6, 1972, they received the $350,000 SBA loan. (617, 452)

On this same day, a luncheon was arranged at the Shun Lee Dynasty Restaurant in Manhattan. Present at this time was RePass, Sylvia Bailey, Gordon Saks and an attorney. (453) Appellant showed up about an hour later and was handed $35,000 in an envelope by Saks in the bathroom. (630, 453, 953-55) Two days later, Saks issued two $2,000 checks for Devins and appellant.

NORTH STATE PACKING COMPANY

In the summer of 1973, Saks again spoke to appellant, who told him that loans would be available for minority groups, especially blacks,

and the limit on this type of loan was $50,000. (638) Appellant represented that he could make certain that they would get such a loan at a cost of 12% of its face value. The people at SBA would receive 10% and he in turn would receive 2%. (638)

Two weeks later, Saks put an advertisement in the Amsterdam News, seeking people who wanted to go into their own business. They only filed one application from the responses, but that application was rejected. (641) Counsel immediately objected to this line of questioning, stating that it was now impressed upon the jury's minds that there was even another loan that appellant had worked on, and that had been sent to SBA. (641) The Government in turn argued that this testimony was preliminary to the North State transaction. The Court replied that it had already gone through this, and ordered the testimony striken. (641)

Saks then stated that the North State Packing Company was developed by him and Sylvia Baily. Their objective was to go into the hog producing business with SBA funds. (643) The President of this enterprise was Patrick Moore who had a small hog farm in Northern New York. (643) In November of 1973, Saks prepared the North State SBA application which contained numerous false statements. Saks even signed the application, using the name George Saunders. (646-649)

Before Saks filed the application, he spoke to appellant, who instructed him to pay the 12% when the loan was funded. (652) At one time, Saks had told appellant that he would like the $50,000 loan for a fictitious company set up by Baily and Moore. Appellant thereafter

reviewed part of the application with him, and said it seemed satisfactory. (653-54) On February 5, 1974, North State received $50,000 and on February 22, 1974, Saks gave appellant $6,000 in cash. (667)

Saks also testified that he filed SBA applications for Francis Cheung, Clayton Camper Park Grounds and State Appliance Company. (697-98) The funds obtained from Clayton and State Appliance loans were to be used by Saks and Baily to purchase real estate in New York. (723) Although appellant had instructed them to go to the SBA offices at a particular time regarding these applications, he never saw the Clayton application. (719)

On July 17, 1974, Saks learned from appellant that the loans for the above companies had been cancelled because the people inside were aware of an intensive investigation of SBA by the FBI. (727)

Prior to this, in November of 1973, Agent Tober from the FBI had contacted Saks and said that he wanted to speak with him. Saks called appellant to ask what he should say regarding Modern Century. When Saks specifically asked him how they would explain the payments, appellant said "Why can't we say that it is a payment partially for television time, and the balance payable as part of a commission that I was to recieve on sales of encyclopedias to a particular market chain." (730) Together they rehearsed a story. (731) On November 27th, Saks

met with Agent Tober and told him the story. He specifically said that Randall and appellant were not involved in the loan. (732-733)

It was in July of 1974 that Saks told appellant that RePass was co-operating with the Government. Appellant responded that they would have to invent some story to ruin RePass' credibility. (735) In September of 1974, Saks began to co-operate with the Government, and was arrested on a 13-count indictment regarding the Cheung loan.

Saks admitted that he never saw appellant at SBA or with anyone from SBA. (808-809) Although appellant was out of the country from August 3rd to September 3rd, Saks had testified to at least 15 meetings and various telephone conversations with him during this time period. (898)

OTHER SIMILAR ACTS

During the course of the trial, the Government attempted to elicit from various witnesses details regarding other false loan applications. The Government attempted to show that Illustrated Lincoln Reader's application was the same type of transaction as Modern Century with the same participants and the same modus operandi. (461-462) Counsel strenuously objected to the introduction of this transaction and stated that any conceivable probative value was far outweighed by its prejudicial effects. (462) It was appellant's position that he had nothing whatever to do with this loan. (463) The Court thereafter asked the Government why it needed to show similar acts when it

had four separate indictments in this one trial. According to the Court, under such circumstances, the testimony would be cumulative. (468) The Government attempted to justify the admission of this testimony by stating that perhaps it was overtrying the case, but that the Government had only one shot at appellant. (469) The Government stated that if there were some "graceful" way to withdraw this Illustrated Lincoln Reader testimony without making the Government appear as if it had done something wrong, it would do so. The Court then instructed the jury as follows:

> Members of the jury, I have decided as a matter of law not to permit any further inquiry in connection with the Illustrated Lincoln Reader, and you are to disregard the testimony that has been offered so far in connection with that. (474)

DEFENSE

Appellant, 48 years of age, testified that he was married, had three children, and had received an honorable discharge from the Marine Corp. (1144-45) Appellant had received a B.A. degree from Long Island University and took special banking courses from the American Banking Institute. (1148) He was also President of his church for 10-1/2 years and was on the board of directors of a girl's orphanage for four years. (1148) He also supports his crippled mother who is 82 years of age. (1149) Appellant started working with SBA on October 15, 1961 and left this employment because he had been

offered a post with a private firm. He is now self-employed as a financial and managerial consultant. (1150-51)

In the fall of 1972, Randall asked him to go to Devins' office. Catale, Costa, Randall, Devins, and Ugis were already there and were working on the Mini application. He reviewed it only from a technical point of view. (1155) By technically, he meant that he looked at the application to determine if the statements were properly set forth in a manner acceptable to SBA. For example, appellant would advise them that they should lower their debt because it was higher in their statements or he would state that their working capital ratio was not good. (1157) He was not responsible for any of the figures. They were just furnished to him. (1158) Before this meeting, appellant had never heard of Mini Enterprises and had no knowledge whether the facts contained in the loan application were true or false. (1154)

Appellant denied ever telling anyone that he could "deliver" SBA. He stated that he had no influence there and had no power to get loans approved or disapproved. (1161) He never called or met with anyone from SBA in connection with the Mini application. (1164) Moreover, appellant stated that he never demanded any money for his services in connection with this application. (1161) He received nothing, nor did he ask for anything. (1162) Appellant explained that he went to look at this application only because Randall had made a small

loan to Costa and Catale and had told him that Catale had many contacts that could help him. (1162) Hence, he thought that it would be a good idea to accomodate Mr. Randall. (1162) He did not know that the figures from Smoke Watchers were being put down on the Mini application. (1163)

Appellant also denied that he ever got paid $42,000 which Catale claimed was given to him in the Pan American Building. (1163)

According to appellant, he met Saks and RePass at Randall's office in the fall of 1972. Saks said that he wanted a 90% bank guaranteed SBA loan and asked him to fill him in on the requisite information. (1167) Appellant did look at the Modern Century application, but he had no knowledge of the contents of this application. (1168-69) It was possible that he told RePass and Saks to put down special phrases in connection with Modern Century. However, he never got paid for his services or demanded any money in connection with this application. (1169) He admitted arriving late in the Chinese restaurant, but denied that he left the men's room with an envelope containing $35,000. (1171)

In April of 1973, appellant first met Costa and knew that he controlled Smoke Watchers. (1176) Randall and Costa had told him that Smoke Watchers was experiencing financial difficulties, and needed a loan. (1171) When Costa asked for his help in expediting this particular loan, appellant in clear terms told him that neither he or anyone else could help him. He did tell Costa to speak to the bank and have the bank pressure SBA. (1179)

On April 19th or 20th, Catale told him that Smoke Watchers was having difficulty with a stockholder. (1185) Catales asked him to do a favor and play act that he was knowledgeable at SBA and could do certain things. (1186) He did in fact playact during Catale's several telephone calls to his home. (1186) Appellant stated that he never demanded $20,000 worth of stock and did not threaten Smoke Watchers that their loan would be killed if they did not pay $60,000. (1187) He never contacted either the bank or SBA in reference to this application. On the tapes, appellant reiterated that he was merely "playacting." (1188, 1190)

Appellant further testified that he had nothing whatever to do with North State Packing Company. (1212) He only saw the application in the fall of 1973, but could not even remember it. (1213-14)

In August of 1973, Saks told him that he had a program where he could solicit people who were interested in obtaining minority loans. (1215) Saks had a proposal to provide a package deal for such applicants which would include accounting, tax, and consulting services. The charge would be 10% of the face amount of the loan. Saks brought this topic up in connection with the North State application. Appellant did not feel that such a plan was practical, since SBA loan applications require that the 10% fee be set forth. (1215-16) He had nothing to do with the approval of the North State application and never received $6500 as a payoff. (1223-24) Although he heard of Clayton Camper, he did nothing regarding this application. (1226)

On September 15, 1975, Saks came to his house and stated that the FBI had arrested him in connection with the Cheung Garden loan. (1227) He looked and felt very depressed. (1228) Saks wanted him to talk to someone at SBA, but appellant kept insisting that he did not know anyone there. At this time, he was not aware that the companies were phony. (1231)

Finally, in regard to the State Appliance application, he never talked to anyone at SBA regarding it or received any money. (1233)

Appellant also presented three character witnesses in his behalf who all testified to his excellent reputation for truthfulness and integrity: Kosta Vellios, a retail florist and presently holding the highest lay position in the Greek Church; Danos H. Kallas, a retired government executive who had been cleared for top security clearance; and Angelo Gavalas, Pastor of Three Hierarchy Greek Orthodox Church in Brooklyn. (1194-95, 1201-1203, 1206-08)

At sentence on November 18, 1975, counsel in an affidavit dated June 4, 1975 moved for a new trial. (S-1)* Counsel argued that the Government in its summation had repeatedly referred to a Mr. Spedale as appellant's inside man at SBA. (S-3) However, unknown to the defense, the Government was taping Mr. Spedale in order to present a case to the Grand Jury against him. (S-3) After Mr. Spedale was indicted, he died of a heart attack. (S-4) Counsel claimed that it was his understanding that Spedale had made some statements on the tape that would demonstrate that appellant was innocent and was telling the truth on the stand. (S-4) Finally, in this regard, Counsel pointed out that Spedale was under the Government's control.

The Court in response to this allegation stated:

> These tapes, Mr. Gotkin, were recorded subsequent to trial. The question of Mr. Spedale's production or non-production at the trial was covered by the Court's charge to the jury. I don't believe there is any reason for me to set aside the verdict on the basis of information, even if it is exculpatory of Mr. Hero which took place subsequent to the jury verdict in this case.
>
> How could Mr. Wilson know about that ahead of time? Apparently at that time he was pursing an investigation of Mr. Spedale which culminated in his indictment. I think it would have been a difficult position for Mr. Wilson to have put Mr. Spedale on the stand at a time when he was under active investigation by the Government for some of the crimes about which I have become familiar with in the trials that I have had with respect to Mr. Devins and Mr. Hero. (S-5)

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*Numerical references preceded by the prefix "S" refer to the pages of the sentence transcript.

Counsel stated that the tapes should be treated as newly discovered evidence. (S-5) The Court then denied the motion, stating that it did not believe that the tapes were the type of newly discovered evidence that would have affected the jury's verdict. (S-5)

ARGUMENT

POINT I

THE JOINDER IN ONE TRIAL OF THE FOUR SEPARATE INDICTMENTS DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Appellant was forced to proceed to trial on charges set forth in four separate indictments, each involving four distinct conspiracies and substantive crimes as well. Despite appellant's motion for a severance, the Court apparently sustained the joinder on the strength of Fed. R. Crim. Proc. 8(a). This statute permits the joinder of several crimes when the offenses are the same and are based upon the same acts or transactions, or if the transactions together constitute parts of a common scheme or plan. Based upon the facts of this case, the Court's failure to direct a severance deprived appellant of his due process right to a fair trial.

In denying appellant's motion for a severance, the Court did not even consider the highly prejudicial effects of compelling him to be tried in a single trial on the four separate indictments. However, throughout the course of the trial, such prejudice became manifest.

First, by joining the four indictments together, the Government was unfairly permitted to bolster the credibility of its principal witnesses to

each of the charges, United States v. Williamson, 482 F. 2d 508 (5th Cir., 1973). Any doubts the jury had regarding Saks', RePass', Costa's, or Baily's credibility had to have been easily dispelled when the jury heard their cumulative testimony. It was thus impossible for counsel to argue that all these prosecution witnesses were lying, although counsel quite readily demonstrated their dubious character and the substantial benefits which they received from the Government because of their testimony against appellant. Since credibility was the only real issue to be decided by the jury, the Government had a decided advantage against appellant when permitted to lump the four indictments together in this single trial. Hence, with such overwhelming testimony the jury convicted appellant of all the charges against him.

Second, the law regarding conspiracy is a difficult concept for jurors to understand. Not only must they comprehend this complex doctrine, but also they must properly apply the law to the facts. In this case, because of the multiple indictments, the jury had to consider at least two separate conspiracy charges (i.e., Modern Century and North State) in conjunction with two entirely and separate factual situations. While a conspiracy count may be joined with the substantive offenses which are its objectives (James v. United States, 416 F. 2d 467 (5th Cir., 1969)) the rule should be otherwise when the charges initially encompass four separate comspiracies and their accompanying substantive charges. It is simply too arduous a task for jurors to sort out these cumbersome facts and apply these facts to the correct conspiracy charge.

Moreover, it cannot be argued that the Court's instructions to the jury that each conspiracy was to be considered separately from the other would be effective. No jury, after hearing such detailed evidence pertaining to four separate conspiracies, could be expected to perform such a feat. Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964).

Finally, and even more devastating, the consolidation in this case forced appellant to defend against four separate conspiracies occurring at different times. Appellant, who continually protested his innocence even up to the date of sentence, had to take the stand and defend himself against all the Government charges. While he might have been able to take the stand and effectively defend himself against some of the charges, he certainly could not do so against all the charges. This problem was succinctly set forth in Cross v. United States, 355 F. 2d 988, 989 (D.C. Cir., 1964) wherein the Court stated:

> Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balance of several factors with respect to each count; the evidence against him, the availability of defense evidence other than his testimony, the possibile effects of demeanor, impeachment, and cross examination. But, if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other counts. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

Consequently, appellant's ability to effectively defend himself against all of the charges was seriously hampered by the joinder of the four conspiracy charges.

It is submitted that if such a joinder is to be sustained, the trial Court must first consider the facts of each case to determine whether the prejudicial effects of the joinder outweigh the economic feasibility of a single trial. In this case, the damaging effects of compelling appellant to proceed to trial on the four charges have been set forth. The Government, on the other hand, cannot offer any justification for the joint trial, other than economic considerations, and this Court has never sanctioned depriving a defendant of a fair trial solely for the sake of expediency. United States v. Nadler, 353 F. 2d 570 (2d Cir., 1965); United States v. Spector, 326 F. 2d 345 (7th Cir., 1963).

In sum, it must therefore be found that appellant, by virtue of the joinder of the four separate conspiracy charges, was deprived of his due process right to a fair trial.

POINT II

THE TESTIMONY PERTAINING TO THE PRIOR SIMILAR ACTS WAS SO PREJUDICIAL THAT APPELLANT WAS DEPRIVED OF A FAIR TRIAL.

Not only was appellant forced to endure the prejudicial effects of being tried on four separate indictments in a single trial (see POINT I), but also the Government had the temerity to introduce other similar acts for which

appellant was never charged. After hearing such detailed evidence together with the evidence pertaining to the four indictments, there was no conceivable way that appellant could receive a fair trial.

Much to the chagrin of the Court, the Government continued to elicit testimony from its witness Saks demonstrating that appellant had committed other criminal acts. First, the Government questioned Saks regarding an SBA application for Illustrated Lincoln Readers and intended to establish that this was the same type of transaction as Modern Century. After the testimony had been elicited and counsel had entered a strenuous objection, the Court questioned the Government regarding their need for such evidence in light of the four indictments. At that juncture, the Government frankly admitted that perhaps it was "overtrying" the case but that the Government had only "one shot" at appellant. (469) Pursuant to an agreement of all concerned parties, the Court then instructed the jury to disregard the aforementioned testimony. (474) That such testimony was inhertently prejudicial cannot be denied. First and foremost, as pointed out previously, once damaging testimony is heard by the jury, even the most vigorous instructions from the Court cannot erase its prejudicial effects from their minds. And second, the Government's justification for eliciting such testimony is totally devoid of merit. It was the Government's choice that they had only this "one shot" against appellant. Had appellant's motion for a severance been granted, the Government would have had multiple opportunities to secure a conviction.

Certainly, the Government cannot have it both ways. On the one hand, they should not be permitted to argue that the indictments should be consolidated and then after consolidation is granted, argue that potentially prejudicial evidence should be admissible because the Government has this "one shot" at the defendant. Such positions are contradictory.

Moreover, even though the Court had struck the testimony pertaining to Illustrated Lincoln Readers, the Government still persisted in attempting to elicit further testimony of similar criminal acts involving appellant. The Government had Saks testify that in order to obtain SBA loans intended for minority groups, he placed an ad in the Amsterdam News. Although he received several responses, he filed only one SBA application, but this application had been rejected. (641) Again, upon counsel's objection to this testimony, the Government attempted to argue that such testimony was preliminary to the North State transaction. The Court, however, ordered this testimony to be stricken. (641) Thus, despite the Court's admonishment to the jury to disregard it, the Government had already accomplished their objective. The testimony was well entrenched in the jurys' minds.

This evidence of the two alleged similar crimes was ostensibly intended by the Government to demonstrate that when appellant had committed the acts charged in the indictment, he had done so knowingly. Admittedly, this Court has held that evidence of other crimes is

admissible for a relevant purpose, including proof of knowledge. United States v. Deaton, 381 F. 2d 114 (2d Cir., 1967); United States v. Crisona; 416 F. 2d 107 (2d Cir., 1969) However, as the Court stated in Deaton, such evidence is admissible only if its probative value outweighs its prejudicial effect, the prejudice being the danger that the jury is likely to conclude that because the defendant committed the similar crimes, he is a "bad person" who deserves to be punished irrespective of whether the Government has proved beyond a reasonable doubt that he has committed the crimes charged in the indictment.

Whether the probative value of such evidence outweights the prejudicial effect is a matter, in the first instance, for the trial judge's discretion. Here, the Court felt such evidence was inhertently prejudicial but the Government persisted in their endeavors to have the jury hear this damaging testimony. Hence, the Government's intentions were to prove that appellant was indeed a "bad person" capable of committing the crimes charged.

Under such circumstances, since the Government deliberately elicited such inherently prejudicial testimony, appellant's conviction must now be reversed and a new trial ordered.

POINT III

APPELLANT'S NEWLY DISCOVERED EVIDENCE, OBTAINED SUBSEQUENT TO HIS TRIAL, REQUIRES THAT THE VERDICT BE SET ASIDE AND A NEW TRIAL HELD; OR ALTERNATIVELY, AT THE VERY LEAST, HE SHOULD BE ENTITLED TO A HEARING.

In no uncertain terms, appellant at sentence claimed that the Spedale tapes, which were obtained by the Government subsequent to his trial, corroborated his claim of innocence. It was appellant's position that the Government throughout his trial continually inferred that Spedale was appellant's inside man at SBA. Apparently, the tapes controverted this inference, and demonstrated that appellant had never been a member of any conspiracy to submit false loan applications to SBA.

Admittedly, in order to merit a new trial, appellant must now meet the heavy burden of establishing that this newly discovered evidence would have affected the jury's determination of his guilt or innocence. United States v. Hilton, _F-2d_ (2d Cir., decided 8/8/75); United States v. Keogh, 391 F. 2d 138 (2d Cir., 1968). It is submitted that the record in this case establishes that appellant has more than satisfied his burden.

While the Government presented more witnesses than did appellant, this factor is certainly not controlling. The Government's witnesses repeatedly contradicted themselves; some even committed perjury; the witnesses substantially benefitted by their testimony against appellant since the Government obviously was either not going to prosecute them or would not recommend prison sentences; and finally, the majority of the witnesses were of questionable character. In contrast to this testimony, appellant presented the picture of the epitomy of the law-abiding citizen. He was a

respected member of the community; he held a high lay position within the Greek Church; he performed many needed community services; he presented three character witnesses in his behalf who all attested to his outstanding reputation in the community; and even more important, he continually has maintained his innocence and asserted that he had no knowledge whatever that the loan applications were false. In this light, any evidence that appellant could present in support of his allegation of innocence had to affect the jury's determination of his culpability.

It is no answer to this argument that appellant could have called Spedale as his witness during the the trial. It is evident that during his trial more than an aura of suspicion had focused on Spedale and if called as a witness, he would be compelled to take the Fifth Amendment. Unquestionably, it would be devastating for any defendant to call a witness in his behalf who would invoke his privilege against self-incrimination.

Consequently, considering all of the above factors, appellant should either be granted a new trial, or alternatively, a hearing should be held.

CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT SHOULD BE ACCORDED A NEW TRIAL, OR ALTERNATIVELY, IN ACCORDANCE WITH POINT III, A HEARING SHOULD BE ORDERED.

RESPECTFULLY SUBMITTED,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

MARCUS GEORGE HERO,
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the **20th** *day of* **January** *19* **76** *at* **1 St. Andrews Plaza, New York, New York** *deponent served the annexed* Brief *upon*

THOMAS J. CAHILL

the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **20th** *day of* **January** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418050
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA